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In the Supreme Court of the United States

OCTOBER TERM, 1957

BOYD S. LEEDOM, ET AL., INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

WILLIAM KYNE, INDIVIDUALLY AND AS PRESIDENT OF BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, A VOLUNTARY UNINCORPORATED LABOR ORGANIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court below (R. 37–39) is reported at 249 F. 2d 490. The findings, conclusions, and order of the district court, which are unreported, are set forth at R. 24–32.

JURISDICTION

The judgment of the court below (R. 40) was entered on September 16, 1957. The writ of certiorari

was granted on January 13, 1958 (R. 41). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), and of other relevant statutes are set forth in the Appendix, pp. 39–44, *infra*.

QUESTION PRESENTED

Whether a federal district court has jurisdiction to set aside a certification issued by the National Labor Relations Board under Section 9 (c) of the National Labor Relations Act, as amended, upon allegations by the labor organization receiving the certification that the Board failed to comply with statutory requirements in establishing the bargaining unit covered by the certification.

STATEMENT

A. The Board representation proceeding giving rise to this suit

On October 15, 1955, respondent, the president of the Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America (hereinafter called the Engineers Association), filed with a Regional Director of the Board a representation petition under Section 9 of the Act (R. 3–4, 11, 25–26). This petition sought an election for the purpose of certifying the Engineers Association as the exclusive bargaining agent for a unit of about 166 engineering employees in five job classifications, working at the Cheektowaga, New York, plant of the Westinghouse Electric Corporation. The five classifications were

engineer, engineer associate, engineer assistant, engineer senior, and engineer fellow (R. 3, 12–13, 25–26). At the hearing, held on March 7 and 8, 1956, before a Board hearing officer, the Engineers Association moved to amend the unit specified in its petition so as to include five additional groups of engineers working at the plant, totaling about 67 employees (R. 4, 13, 26).

The Buffalo Salaried Employees Association (hereinafter called the Salaried Employees), which had been permitted to intervene,[1] agreed that all of the approximately 233 (166 plus 67) employees whom the Engineers Association sought to represent were professional employees within the meaning of Section 2 (12) of the Act (R. 4, 11, 13, 26). It contended, however, that five other categories of employees, embracing fourteen persons, were similarly professional employees and that they should also be included in the professional unit. These five other categories were engineer order service, engineer test record, engineer contact, order correspondent master, and safety inspector (R. 4, 13, 26). The Engineers Association opposed the inclusion of these last categories of employees on the ground that the persons covered thereby were not professional employees (R. 13).

The Board, on the basis of the record adduced at the hearing, issued a decision on May 28, 1956, directing the holding of a representation election (R. 4–5,

[1] The Salaried Employees had been certified by the Board in 1946 as the representative for a combined unit consisting of two groups of professional employees and one group of salaried nonprofessional employees (R. 13, n. 5).

11–18, 26–28). The Board held, as the parties had stipulated, that the 166 employees named by the Engineers Association in its petition, as well as the 67 other engineering employees it later sought to include in the proposed unit, were all professional employees within the meaning of Section 2 (12) of the Act (R. 4, 13, 26–27). The Board further held that none of the five categories of employees (covering 14 additional persons) whom the incumbent Salaried Employees Association sought to include were professional employees within Section 2 (12) (R. 4–5, 14–16, 27). However, the Board concluded that the nonprofessional employees occupying the three job classifications of engineer order service, engineer test record, and engineer contact shared a "close community of employment interest" with the professional engineers;[2] and that, since they constituted only nine employees, their inclusion with the 233 professional employees would not "destroy the predominantly professional character" of the unit proposed for the professional engineer employees (R. 5, 14–16, 27).

[2] In this connection, the Board noted that these employees had considerable engineering education and engineering experience, were occasionally transferred to the professional engineering categories, worked in the same general area and under common supervision with the professional engineers, collaborated and consulted with the professional engineers, and voted with the professional engineers in the 1946 election (n. 1, *supra;* R. 13–15, 16). The other employees urged by the Salaried Employees, *i. e.*, the correspondent masters and safety inspectors, the Board noted, did not share this mutuality of employment interests and had not been included with the engineers in the 1946 election (R. 15–16).

In so deciding, the Board concluded that the provisions of Section 9 (b) (1) of the Act[3] did not require it to afford the approximately 233 professional employees a separate self-determination election to determine whether they desired to have the nine nonprofessional employees included in the same collective bargaining unit. As shown by the cases cited in its decision (R. 16, n. 7), it has consistently been the Board's position that this section was designed to apply only where the professional employees constitute the minority group in a proposed unit, in which event a separate self-determination election would be necessary to afford them an effective voice in selecting the bargaining representative. In the Board's view, Congress did not intend the provisions of this section to empower professional employees to limit the scope of a unit in which they constitute a clear majority, thereby depriving other employees with a close community of employment interests of the most suitable means of exercising their collective-bargaining rights.

Accordingly, the Board directed an election in the combined unit of the 233 professional employees and the nine nonprofessionals. The unit was described as follows (R. 5, 17–18; 27–28):

> All professional employees, including the categories of engineer assistant, engineer associate, engineer, engineer senior, engineer fellow,

[3] Insofar as relevant here, Section 9 (b) (1) provides:
"*Provided*, That the Board shall not (1) decide that any unit is appropriate for [purposes of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *."

> manufacturing engineer, manufacturing engineer senior, plant layout engineer, methods engineer (formerly time and motion analyst), purchasing engineer, engineer order service, engineer test record, and engineer contact, but excluding the categories of machine designer, order correspondent master, and safety inspector, all other employees, guards, and supervisors as defined in the Act.

The employees were afforded the choice of selecting the Engineers Association, the Salaried Employees Association, or neither, as their bargaining representative (R. 5, 17–18, 28).

On June 14, 1956, an election by secret ballot was conducted among the employees in this unit (R. 6, 19, 29). A majority of the employees designated the Engineers Association as their collective bargaining representative, giving that Association 126 of the 228 votes cast (R. 6, 21–22, 29). Thereafter, on June 21, 1956, the Engineers Association was certified as the exclusive bargaining agent of the unit described in the Board's direction of election (R. 6, 19–20, 29).

B. The instant suit

On July 12, 1956, respondent, president of the union certified by the Board, instituted this suit in the United States District Court for the District of Columbia for the purpose of having the certification reviewed and set aside. The jurisdiction of the court was invoked under 28 U. S. C. 1337 and Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009 (R. 2). The gravamen of the complaint was that the Board "exceeded the scope of [its] statutory

authority" and "failed and refused to comply with Section 9 (b) (1) of [the] Act" (R. 7–8) by determining that a unit composed of 233 professioonal employees and nine nonprofessional employees was appropriate for the purpose of collective bargaining, without first affording the professional engineering employees a separate election to determine whether or not they desired to be included with the nonprofessional employees.

The Board moved to dismiss the complaint or, in the alternative, for summary judgment in its favor, on the grounds that the district court was without jurisdiction of the subject matter and that the complaint failed to state a claim warranting judicial relief. Respondent thereafter filed a cross-motion for summary judgment (R. 20–21, 23).

On December 3, 1956, the district court denied the Board's motion and granted respondent's motion for summary judgment (R. 23). The court held that it had jurisdiction to review the Board's representation determination; that Section 9 (b) (1) of the Act was applicable; and that the Board exceeded its statutory authority in failing to afford the professional employees a separate self-determination election (R. 30). The court entered an order (R. 31–32) which directs the Board to set aside and vacate the prior election and certification, and to process further the representation petition filed by the Engineers Association. The order restrains the Board from finding a unit including both professional employees and nonprofessional employees to be appropriate for purposes of

collective bargaining without first affording the professional employees a self-determination election.

The Board appealed to the court below. Without contesting the district court's interpretation of Section 9 (b) (1), the Board contended that Congress intended to preclude judicial review of Board representation determinations except to the limited extent provided in Sections 9 (d) and 10 (e) and (f) of the Act, *i. e.*, where the determination had become the basis for an unfair labor practice order and that order was before the Court of Appeals for review or enforcement. On September 16, 1957, the court below affirmed the decision of the district court, holding that "review by way of § 10 is too remote and conjectural to be viewed as providing an adequate remedy" in this case (R. 39).[4] It held further that the representation determination could be reviewed by an original equity suit in the federal district court, since the issue presented was not "in the wide area of determinations which depend on the Board's expertise and discretion," but entailed "Board violation of a

[4] The Board had contended that the union conceivably could have obtained review of the certification under the statutory review procedure. That is, the union could have refused to bargain with the Company except for a unit of only professional employees, thereby subjecting itself to a charge that it had violated Section 8 (b) (3) of the Act. Were the Board then to issue an order requiring the union to bargain in the unit covered by the certification, the union could obtain review of that order and the underlying certification under Sections 9 (d) and 10 (e) or (f) for, when such an order is brought to the Court of Appeals upon a petition for review or enforcement, the validity of the representation determination itself is open to full judicial review. *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376.

statutory requirement and resulting injury" (R. 38–39).

SUMMARY OF ARGUMENT

A. On its face, the National Labor Relations Act indicates a purpose to limit judicial review of Board representation determinations. Section 10 (e) and (f) provides for review, in the appropriate Court of Appeals, of a final Board order entered in an unfair labor practice proceeding under Section 10. The Act refers to court review of Section 9 representation proceedings in but one instance. Section 9 (d) provides that when a certification has become the basis for an unfair labor practice order, and that order is before the Court of Appeals under Section 10 (e) or (f), the certification itself is also open to review.

The fact that Congress made representation proceedings judicially reviewable in only this situation suggests not merely a purpose to preclude a broader review by the Court of Appeals, but also an intention to bar such review by the district court. This inference is strengthened by the further circumstance that the Act does confer jurisdiction upon the district courts in respect to other matters. See Sections 11 (2), 10 (j), and 10 (l).

B. The legislative history of both the original and amended Acts confirms that Congress intended to provide only the limited review of representation determinations permitted by Section 9 (d). In 1935 when the original Act was passed, two years later, and again when the 1947 amendments were enacted, Congress considered proposals which would have expanded court review of Board representation deter-

minations so as to provide, *inter alia*, a method of direct review for employees and labor organizations who were adversely affected by a Board representation determination and could not obtain review pursuant to Section 9 (d) of the Act. Congress rejected these proposals and decided to retain the limited review provided by Section 9 (d), because it believed that broader review would result in dilatory tactics in representation cases, thus frustrating the statute's basic policy of promoting collective bargaining.

The distinction drawn by the court below—between a representation determination which entails the exercise of Board expertise or discretion, and one which involves the application of a specific statutory requirement—is not supported by the legislative history. Direct judicial review of Board representation determinations involving the application of statutory rules would nullify Congress' objective of avoiding delay in representation proceedings no less than direct review of other Board action in representation proceedings. Moreover, virtually every challenge to Board action in a representation proceeding can be cast in terms of breach of statutory authority, thereby defeating Congress's purpose in limiting judicial review of such proceedings.

C. This clear manifestation of Congress's purpose to preclude judicial review, except to the extent specified in Section 9 (d) of the Act, has the effect of withdrawing from federal district courts any jurisdiction under their general equity powers to review Board determinations, at least in the absence of a substantial

constitutional question. Precisely in point is the decision in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, arising under the Railway Labor Act, a case in which a labor organization sought to contest a certification by the Mediation Board on the ground that it had acted erroneously as a matter of law. After examination of the type of problem involved, the history of the statute, and the highly selective manner in which Congress provided for judicial review under the Railway Labor Act, this Court concluded that Congress intended to preclude judicial review of representation proceedings, even though questions of law might be involved. Application of the same criteria of judgment to this case leads to the same conclusion. Indeed, the case for preclusion of review under the National Labor Relations Act is even stronger in the light of Congress's specific rejection of proposals for direct review of representation proceedings.

D. Although we do not believe that the Board's decision on the merits is before this Court or that the correctness of the Board's position on the merits is strictly relevant to the question of reviewability which is here, the Court might consider that in a situation characterized by complete arbitrariness there would be special reasons for implying the availability of a review procedure not otherwise open. We point out, therefore, that the Board's settled interpretation of Section 9 (b) (1) has rational basis.

Although the literal language of the section may suggest that the Board is required to afford profes-

sional employees a self-determination election *whenever* it is proposed to group them in a unit with other employees, the legislative history indicates that the provision had a narrower purpose. This history shows that Section 9 (b) (1) was merely aimed at protecting professional employees from being engulfed in a larger bargaining unit against their will. The Board's interpretation—which accords professional employees a self-determination election when they constitute a minority group in the proposed bargaining unit, but not where, as here, they constitute the predominant majority—thus effectuates the Congressional purpose. Moreover, Congress has been aware of the Board's interpretation of Section 9 (b) (1) from the early date that it was first enunciated, and has in effect acquiesced in it.

ARGUMENT

Congress intended to preclude review of Board representation determinations in the District Court

This case presents a question which the Court has twice reserved—whether a Board certification of a bargaining representative may be reviewed by an original action in a federal district court. See *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 412; *Inland Empire District Council* v. *Millis*, 325 U. S. 697, 700. The general jurisdiction conferred on the district court by 28 U. S. C. 1337 and by Section 10 of the Administrative Procedure Act would authorize review of Board representation determinations, unless Congress, by the National Labor Relations Act, has foreclosed such

review. For, "constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 301. And, with respect to the National Labor Relations Act in particular, this Court has recognized that "Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective." *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261, 264.

Here, as in the *Switchmen's* case, "the type of problem involved and the history of the statute in question become highly relevant" (320 U. S. at 301) in deciding whether district court jurisdiction has been restricted.[5] In our view, an examination of

[5] *Harmon* v. *Brucker*, Nos. 80 and 141, October Term, 1957, decided March 3, 1958, does not establish any different principle. In that case, the Court held that the district court possessed jurisdiction to review certain discharges granted by the Secretary of the Army, alleged to be beyond his statutory authority, though the underlying statute provided that the findings of the Secretary were to be "final." The Court stated that: "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." The fact that judicial review "generally" is available does not mean that there may not be some circumstances where Congress will be deemed to have foreclosed such review. Indeed, one of the cases cited in *Harmon* is *Stark* v. *Wickard*, 321 U. S. 288, where the Court, although holding that judicial review was available in the situation there presented, expressly distinguished the *Switchmen's* case, *supra*, on the ground that the nature and character of the legislation in that case had made clear that Congress did not intend to

these factors reveals that Congress intended to preclude review of Board representation determinations in the district court.

Before turning to these factors, however, it should be noted that the administrative action challenged does not involve an alleged denial of procedural due process or any other constitutional question. Respondent's union was afforded a full hearing before the Board on its contention that the nine nonprofessional employees should be excluded from the bargaining unit, the union participated in the ensuing representation election, and, indeed, was subsequently certified by the Board as an exclusive bargaining agent.

A. On its face, the National Labor Relations Act indicates a purpose to limit judicial review of representation determinations

Section 10 (e) and (f) of the Act provides for review in the appropriate Court of Appeals of a final "Board order." In *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, this

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provide a judicial remedy (see 321 U. S. 288, 303, n. 17, 306–307).

In short, as we read *Harmon*, it merely shows that, considering the particular statute and the nature of the administrative action there involved, the Court was not convinced that Congress had unequivocally manifested an intention to preclude judicial review. The fact that the statute provided that the Secretary's finding shall be "final" is not decisive, but only one factor to be considered in making this determination. Cf. *Heikkila* v. *Barber*, 345 U. S. 229, with *Shaughnessy* v. *Pedreiro*, 349 U. S. 48. See, also, *Estep* v. *United States*, 327 U. S. 114; Davis, *Administrative Law* (West, 1951), pp. 832–838. We believe that here, as in the *Switchmen's* case, all of the circumstances warrant the conclusion that Congress did intend to bar district court review.

Court concluded that "Board order" means a final order entered in an unfair-labor-practice proceeding under Section 10, and that accordingly a Board certification—which is the culmination of a representation proceeding conducted under Section 9—is not directly reviewable in the Court of Appeals. The Court's conclusion rested heavily on the fact that the Act refers to court review of Section 9 representation proceedings in but one instance—i. e., when a certification has become the basis for an unfair labor practice order, and that order is itself before the Court of Appeals for review or enforcement. Thus, Section 9 (d) provides:

> Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

The fact that Congress made representation proceedings judicially reviewable in only this situation[*] suggests, not merely a purpose to preclude a broader review by the Court of Appeals, but an intention to

[*] Cf. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 458–459.

bar such review by the district courts as well. "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. * * * In such a case the specification of one remedy normally excludes another." *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301. Moreover, as the Fourth Circuit has observed, "[i]t is hardly possible that Congress should have intended to permit review by District Courts of 9(c) proceedings while so carefully limiting review of such proceedings in the Circuit Courts of Appeals to cases in which an order under 10(c) has been entered." *Madden* v. *Brotherhood and Union of Tr. Employees*, 147 F. 2d 439, 442.

This conclusion finds further support in the fact that the Act does confer jurisdiction upon the district courts in respect to other matters. Section 11 (2) empowers the district court to entertain applications for the enforcement of Board subpenas. And, in amending the Act in 1947, Congress added Sections 10 (l) and 10 (j), which empower the district court to grant temporary injunctive relief against unfair labor practice conduct.[1] Having thus undertaken to assign roles to the district court in the administration of the Act, it could be expected that Congress, had it desired them to play a part in representation proceedings, would have said so. Cf. *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183, 186–187 (C. A. 4), holding that Sections 10 (j) and

[1] The amendments to the Act are contained in Title I of the Labor-Management Relations Act of 1947. Other titles of the latter Act confer additional jurisdictions upon the district court. See *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183, 187–188 (C. A. 4).

10 (l), which empower the Board to petition the district court for injunctive relief, evidence Congress's intention to deny such right to private parties.

B. The legislative history of both the original and amended Acts confirms that Congress intended to preclude judicial review of representation determinations except to the limited extent permitted by Section 9 (d)

The legislative history of both the original and amended Acts confirms that Congress intended to provide only the limited review of representation determinations permitted by Section 9 (d). It demonstrates, indeed, that Congress considered and deliberately rejected any broader review of representation determinations because of its belief that this would result in dilatory tactics in representation proceedings, thereby frustrating the Act's basic policy of promoting collective bargaining.

Thus, as the Court noted in *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 409–411, the Senate Report on the Wagner Act explained the limited provision for review of representation determinations set forth in Section 9 (d) on the ground that it avoided the situation which had existed under Public Resolution 44,[4] where

> any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a com-

[4] This resolution created the first National Labor Relations Board for the purpose of implementing Section 7 (a) of the National Industrial Recovery Act. See 48 Stat. 198, 1183.

> pany has chosen to contest an election order of the Board, has reached decision in any circuit court of appeals.[9]

Similarly, the House Report stated that the unlimited reviewability of election orders under Public Resolution 44

> has been productive of a large measure of industrial strife. When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, * * * the union, unless an election can promptly be held * * *, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power * * *.[10]

In 1937, Congress was asked to reconsider the question of judicial review of Board representation determinations. As a compromise between the Public Resolution 44 procedure (permitting review at the election stage of a representation proceeding) and the Section 9 (d) procedure (permitting a representation determination to be reviewed only when it became the basis of an unfair labor practice order), it was proposed that the Act be amended so as to permit the representation proceeding to be reviewed in the Court of Appeals as soon as it reached the post-election stage of a certification. In a report submitted to the Senate

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[9] S. Rep. No. 573, 74th Cong., 1st sess., pp. 5–6, in 2 Leg. Hist. of the National Labor Relations Act, 1935 (G. P. O., 1935), p. 2305.

[10] H. Rep. No. 1147, 74th Cong., 1st sess., p. 7, 2 Leg. Hist. NLRA, 1935, p. 3053.

Labor Committee, the Board noted that even this proposal presented very serious problems:

> Proceedings for review of a Board's certification would require from 6 months to a year in the circuit court of appeals. Thereafter the losing party would have 3 months in which to apply for certiorari to the Supreme Court, and if certiorari were granted, several more months would pass before final decision could be rendered. * * * All in all, it can be conservatively estimated that, on the average, it would take a year to obtain court review of a Board certification.
>
> Meanwhile, what is happening to the employees who wish to bargain collectively? If the circuit court of appeals, in order to protect the petitioning labor organization, stays further action by the employer pending review, there can be no collective bargaining in the plant at all during that period. If the court stays further action by the Board, then the employees have no recourse, except industrial warfare, against a refusal to bargain by the employer. If the employer is willing to bargain with the certified union and is permitted to do so by the reviewing court, the rights of the rival union may meanwhile be prejudiced to the same extent as if review had not been sought, either by the loss of membership likely to follow the signing of an agreement with the certified union or possibly by a closed-shop agreement forcing all its members into the certified union. Thus, either collective bargaining is suspended entirely during court review, or the labor organization seeking review incurs most of the disadvantages that would have accrued to it without review.

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> Further, when the decision of the reviewing court comes, and the Board's certification is sustained or set aside, such a long period of time has elapsed that the certification is out of date and futile. At the end of the year required for the review the organization certified may or may not represent the majority. This can only be determined by a new representation proceeding and a new certification, which in turn is subject to review.[11]

Concluding that these considerations outweighed the possible advantages of broadened review of representation determinations, Congress rejected the proposed amendment and declined to change the limited review provision of Section 9 (d).

The problem was again considered by Congress in 1947, when it enacted the Taft-Hartley amendments to the Act. Section 10 (f) of the House amendments, following the earlier 1937 proposal, provided for direct review by the Courts of Appeals of Board certifications (H. Rep. No. 245, 80th Cong., 1st sess., 59–60, 1 Legislative History of the Labor Management Relations Act, 1947 (G. P. O., 1948), pp. 199–200, 350–351). In explanation of this proposal, the House report stated (*id.* at 43, 1 Leg. Hist., 1947, p. 334):

> The present act permits appeals from certifications by the Board only by employers, and then only through cumbersome proceedings that always involve risk of strike and of a finding

[11] Hearings before the Senate Committee on Education and Labor on S. 1000, *et al.*, 76th Cong., 1st sess., pp. 584–585. See, also, the testimony of Board General Counsel Fahy, *id.* at 460–463, quoted in *Madden v. Brotherhood and Union of Tr. Employees*, 147 F. 2d 439, 443–444 (C. A. 4).

> that, by following the only course by which he could appeal, the employer committed an unfair labor practice, no matter how much in good faith he doubted the validity of the certification. This procedure is unfair to everyone; the union that wins, which frequently must wait for many months to exercise its rights; the union that loses, which has no appeal at all no matter how wrong the certification may be: the employees, who also have no appeal; and the employer, for whom an appeal involves grave risks. The bill permits any person interested to appeal from a certification, as from a final order of the Board.

Opponents argued, however, that to permit direct review of Board certifications would have serious adverse consequences on collective bargaining, by tending to encourage litigation at the certification stage of Board proceedings. See H. Min. Rept. No. 245, 80th Cong., 1st sess., p. 94, 1 Leg. Hist., 1947, p. 385. In conference, this provision was eliminated, and it was decided to retain the limited review provided in Section 9 (d) of the original Act. H. Conf. Rept. No. 510, 80th Cong., 1st sess., pp. 56–57, 1 Leg. Hist., 1947, pp. 560–561. Senator Taft explained the reason for this decision as follows (93 Cong. Rec. 6444, 2 Leg. Hist., 1947, p. 1542):

> Subsection 9 (d) of the conference agreement conforms to the Senate amendment. The House bill contained a provision which would have permitted judicial review of certifications even before the entry of an unfair labor practice order. In receding on their insistence on this portion, the House yielded to the view of the Senate conferees that such provision would

permit dilatory tactics in representation proceedings.

In sum, Congress was aware that Section 9 (d) permitted only a limited review of Board representation determinations. Thus, an employer dissatisfied with a Board certification could refuse to bargain on this ground. If, thereafter, the Board should nevertheless issue a bargaining order, the employer's petition to review that order could also bring up the underlying certification. See *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 379, 385–386, 388. However, as Congress realized, in the usual situation where a union or employees feel aggrieved by a representation determination, *i. e.*, where it results in the certification of a rival union, this method of obtaining review would not be open to them.[12] Congress nevertheless concluded that the ad-

[12] The only conceivable way that a "losing" union could obtain review under Section 9 (d) of a certification issued to another union is by violating Section 8 (b) (4) (C) of the amended Act. That is, were the "losing" union to picket for recognition notwithstanding the certification, it would subject itself to an 8 (b) (4) (C) charge. In the unfair-labor-practice proceeding, the union could then proceed to contest the validity of the underlying certification, and, should the Board overrule this contention and issue an unfair-labor-practice order, this order, together with the underlying certification, could be brought before the Court of Appeals pursuant to Section 9 (d). Cf., however, *Meat & Provision Drivers Union*, 115 N. L. R. B. 890, 891, 901; *Parks* v. *Atlanta Printing Pressmen & Assistant's Union*, 243 F. 2d 284 (C. A. 5), certiorari denied, 354 U. S. 937; *Tungsten Mining Corp.* v. *District 50, etc.*, 242 F. 2d 84 (C. A. 4), certiorari denied, 355 U. S. 821.

The union here, of course, was certified, so that it was in a better position to obtain review of the certification under Section 9 (d). Just as Section 8 (a) (5) makes it an unfair labor practice for an employer to refuse to bargain with the union which is the representative of his employees, Section 8 (b) (3)

vantages of permitting a broader review of certifications were outweighed by the potential disadvantages, and it accordingly declined to go beyond Section 9 (d). As stated by the Second Circuit, "Congress has dealt in section 9(d) with reviews of certification * * * and has provided therein the only relief it means to grant on that subject." *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716.[13]

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makes it an unfair labor practice for that union to refuse to bargain with the employer. Accordingly, the Engineers Association, contending that the Board's certification of a combined unit of professional and nonprofessional employees was erroneous, could insist that Westinghouse bargain with it solely on behalf of the professional employees. The Engineers Association would thus subject itself to a charge, filed either by the employer or the nonprofessional employees in the unit, that it had refused to bargain as required by Section 8 (b) (3), and, should the Board so find and issue an order requiring the Engineers Association to bargain for all of the employees in the certified unit, the Engineers Association could obtain review of that order and the underlying certification in the Court of Appeals, pursuant to Sections 9 (d) and 10 (e) and (f) of the Act, just as the employer could if he were contesting the certification. Cf. *Douds* v. *International Longshoremen's Association*, 147 F. Supp. 103, 109, 110–112 (S. D. N. Y.), affirmed, 241 F. 2d 278, 282 (C. A. 2). However, the court below concluded (p. 8 n. 4, *supra;* R. 39) that this procedure was inadequate because it was not likely that either the employer or the nine nonprofessionals would file unfair-labor-practice charges if the union refused to bargain for the latter. We believe that the Court's assumption is unwarranted, particularly insofar as the filing of charges by the nine nonprofessionals is concerned.

[13] A union unable to obtain judicial review of a representation determination believed to be erroneous is not without a remedy. It may bring the Board's action to the attention of Congress for appropriate corrective action. In order to facilitate such legislative oversight, Congress, in amending the Act, set up a Joint Committee on Labor-Management Relations to

The court below would apparently read the legislative history as indicating a Congressional purpose to limit judicial review of a representation determination which entails the exercise of Board expertise or discretion—*e. g.*, a determination that one unit of production and maintenance employees is more appropriate for bargaining purposes than a separate production unit and a separate maintenance unit [14]—but as not depriving the district court of power to review a determination which, as here, involves the application of a specific statutory requirement (see pp. 8–9, *supra*). The history does not support such a distinction. As we have shown, Congress limited judicial review of representation determinations because of its conclusion that it is better to suffer dissatisfaction with some representation determinations than to have each one bound up in long drawn-out litigation which could frustrate the statute's objective of fostering collective

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study, *inter alia*, the administration and operation of the Act (Sec. 401 of the Labor-Management Relations Act, 1947, 29 U. S. C., 1946 ed., Supp. V, 191). Indeed, the very question involving Section 9 (b) (1) which respondent sought to have reviewed in this suit was brought to the Joint Committee's attention (see p. 37, *infra*).

Cf. *American and European Agencies* v. *Gillilland*, 247 F. 2d 95, 97 (C. A. D. C.), certiorari denied, 355 U. S. 884:

"The assumption that Congress must always contemplate judicial correction of erroneous agency action seems to have its basis in the view that Congress lacks other means to enforce its statutory mandates. But this is not so: Congress can, if it wishes, amend the law * * *; certainly it always has power to investigate and to impeach. When Congress tells the courts that there shall not be review, we will not assume, in the absence of something more, that Congress could not have meant what it said. * * *

[14] Cf. *DePratter* v. *Farmer*, 232 F. 2d 74 (C. A. D. C.)

bargaining. Direct judicial review of Board representation determinations involving the application of statutory rules affects the length of time in finally resolving such cases no less than direct review of other Board determinations in representation proceedings.

Moreover, in deciding whether the matter is within the area of the Board's discretion, it is usually necessary to decide first whether a statutory restriction is applicable. For example, Section 9 (b) (2) provides that the Board shall not decide that any craft unit is inappropriate for bargaining purposes on the ground that a different unit has been established by a prior Board determination. In most cases where the Board denies a craft unit, the contention can be made that a prior determination was the basis for the decision, contrary to Section 9 (b) (2); hence, only by proving this legal contention to be without merit can it be established that the decision was within the area of the Board's discretion.[15] Similar problems would be encountered in connection with Section 9 (c) (5), providing that "the extent to which the employees have organized shall not be controlling" in determining whether a unit is appropriate.[16] And, even where no specific statutory requirement can be relied on, an allegation of arbitrary and capricious action might be deemed sufficient for review purposes on the ground that the Board has no statutory authority to act un-

[15] See *New Bedford Loomfixers Union* v. *Alpert*, 110 F. Supp. 723, 728 (D. Mass.).

[16] See *Foreman & Clark, Inc.* v. *National Labor Relations Board*, 215 F. 2d 396, 406 (C. A. 9); *Westinghouse Electric Corp.* v. *National Labor Relations Board*, 236 F. 2d 939, 943 (C. A. 3).

reasonably. For these reasons, virtually every Board determination in each of the numerous representation proceedings processed by the Board could be cast in terms of an alleged excess of statutory authority,[17] thereby completely frustrating Congress's intention to limit the reviewability of such proceedings.[18]

It is urged that Congress's intention to limit judicial review of representation determinations should be read in the light of the fact that, under the Wagner Act, the Board's discretion in representation cases was virtually unrestricted. The Taft-Hartley amendments, the argument runs, placed specific curbs on this discretion; hence, it should not be assumed that Congress's intention respecting limited judicial review would cover the reviewability of agency action alleged to be violative of these restrictions. This argument overlooks the significant point that Congress reconsidered the question of expanding judicial review of representation determinations at the time of the Taft-Hartley amendments, and it again decided to retain

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[17] See *Inland Empire District Council* v. *Millis*, 325 U. S. 697; *Fitzgerald* v. *Douds*, 167 F. 2d 714 (C. A. 2); *Fay* v. *Douds*, 172 F. 2d 720 (C. A. 2); *International Union, etc.*, v. *International Union, etc.*, 173 F. 2d 557 (C. A. 8); *Madden* v. *Brotherhood and Union of Tr. Employees*, 147 F. 2d 439 (C. A. 4); *White* v. *Herzog*, 80 F. Supp. 407 (D. D. C.); *Houseright* v. *Hull*, 104 F. Supp. 234 (D. Ohio); *Mechanics Educational Society* v. *Schauffler*, 103 F. Supp. 130 (D. Penn).

[18] In the fiscal year 1956, the Board disposed of a total of 8,070 representation cases. Twenty-first Annual Report of the National Labor Relations Board (G. P. O., 1957), p. 164. The test suggested by the court below removes any practical limitation on the number of such cases which could be subjected to review in the district courts.

the limited review provided in Section 9 (d). In short, with full knowledge of the restrictions which it was imposing on the Board's discretion in representation cases, Congress nevertheless elected to retain a provision which would permit review of representation determinations in only limited situations. There is nothing whatever to show that Congress contemplated any distinction between representation determinations under the Taft-Hartley amendments which involved the exercise of discretion and those which involved application of a specific statutory requirement. As to representation proceedings generally, Congress left Section 9 (d) unchanged, and it did so fully conscious of what it was doing.

C. This clear manifestation of Congress's intent would preclude the federal district courts from exercising a reviewing jurisdiction over Board representation determinations, even though it may be alleged that the Board has acted unlawfully

Congress's manifest intent to preclude federal review of Board representation determinations except to the limited extent permitted by Section 9 (d) has the effect, we submit, of withdrawing from federal district courts any jurisdiction which they might otherwise have, under their general equity powers, to review Board representation determinations, at least absent a substantial constitutional question. The decision in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, is precisely in point.

That case arose out of a certification proceeding under Section 2, Ninth of the Railway Labor Act, a provision analogous to Section 9 of the National

Labor Relations Act. A labor organization aggrieved by the Mediation Board's certification of another labor organization filed suit in a federal district court to have the certification set aside, alleging jurisdiction under 28 U. S. C., 1940 ed., 41 (8) (now § 1337).[19] The Mediation Board had certified the rival labor organization as the representative of all the yardmen for the entire railroad system, including the yardmen (employed at certain yards) whom plaintiff sought to represent as a separate "craft or class" within the meaning of Section 2, Fourth of the Railway Labor Act (320 U. S. at 299, 300–301). The complaining union contended that the Mediation Board had acted erroneously as a matter of law, in that Section 2, Fourth required the Board to treat these employees as a "craft or class," and thus they had the "right" to select a representative by a separate election in their own craft or class (*ibid.*).

This Court, after reference to the type of problem involved,[20] the history of the statute, and the selective manner in which Congress had provided for judicial review of other administrative action under the Rail-

[19] The Railway Labor Act, like the National Labor Relations Act, contains no provision expressly authorizing judicial review of certifications issued by the Mediation Board though, like the latter Act, it contains express statutory provisions for judicial review of other types of administrative actions, *e. g.*, Section 3, First (p), and Section 9, Third (a).

[20] In this connection, the Court observed that the certification proceeding is essentially a fact-finding investigation which, unlike an order involving commands or prohibitions, merely establishes that a majority of the employees in a given bargaining unit desire a particular representative as their bargaining agent. 320 U. S. at 304.

way Labor Act, concluded that the Congressional intent as to representation disputes was plain—"the dispute was to reach its last terminal point when the administrative finding was made," and there "was to be no dragging out of the controversy into other tribunals of law" (320 U. S. at 305). The Court recognized that, if "the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control" (*id.*, at 300). However, insofar as the "right" of the majority of any craft or class of employees to determine their representative was concerned, the Court noted that this right was "protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held" (*id.*, at 301). In these circumstances, it said (*ibid.*):

> A review by the federal district courts of the Board's determination is not necessary to preserve or protect that "right." Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. ***All constitutional issues aside, it is for Congress to determine how the rights which it creates shall be enforced.***

> * * * In such a case the specification of one remedy normally excludes another. [Emphasis added.]

Moreover, the Court added (*id.*, at 303):

> The fact that the certificate of the Mediation Board is conclusive is of course no ground for judicial review. * * * Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one *even where questions of law might be involved.* * * * We need not determine the full reach of that rule. * * * But its application here is most appropriate by reason of the pattern of this Act. [Emphasis added.]

This same reasoning applies with equal force to district court review of representation determinations under the National Labor Relations Act. For, like the Railway Labor Act, the National Labor Relations Act contains no general provisions for judicial review of Board orders or determinations, but carefully delimits the type of order which may be reviewed in the courts and precisely defines the tribunal where review may be sought. See Section 10 (e), (f), (j), and (l) of the Act. Again, as in Mediation Board proceedings, the duties of the Labor Board in representation proceedings are essentially fact-finding investigations to ascertain the desires of a majority of the employees in a given bargaining unit. See *Inland Empire District Council* v. *Millis*, 325 U. S. 697, 706. Indeed, the case for preclusion of such review is

even stronger under this Act, for the Railway Labor Act did not have the history (*supra*, pp. 17–22) present here, showing that Congress specifically considered and rejected proposals to permit direct review of representation determinations.

The force of the *Switchmen's* case may not be discounted by viewing it as entailing only a determination within the area of the Mediation Board's discretion, rather than one involving the limits of the Board's legal authority. The Mediation Board had declined the complaining union's request for a craft union on the ground that the Railway Labor Act "vests the Board with no discretion to split a single carrier * * *." *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 309 (dissenting opinion of Reed, J.). Accordingly, the Mediation Board's conclusion that only a system-wide unit was appropriate necessarily presented a question as to the agency's statutory powers. As Mr. Justice Reed noted in his dissent, the Court's holding that the Mediation Board's determination was unreviewable authorized "the Mediation Board to determine not only questions judicially found to be committed to its discretion * * * but *the statutory limits of its own powers* as well" (*id.*, at 321; emphasis added). In short, the issue presented in *Switchmen's* was the same as that presented here, *i. e.*, whether Congress may be deemed to have precluded judicial review of a representation determination which is alleged to be in excess of the agency's statutory authority.[21]

[21] Nor is a different conclusion required by the statement in the *Switchmen's* case that a preclusion of judicial review would

Finally, the *Switchmen's* case is not rendered inapposite, we submit, by the circumstance that this Court failed to apply it in the subsequent *Inland Empire* case, 325 U. S. 697 (p. 12, *supra*), which involved a National Labor Relations Board certification. In *Inland Empire,* the Court indicated that it would be inappropriate to decide whether the district court had jurisdiction to review a Labor Board certification, absent "some showing that the Board has acted unlawfully" (325 U. S. at 700); it then went on to find that there was no substance to the claim that the Board had erred, and sustained the dismissal of the suit on this ground. Accordingly, in *Inland Empire,* the Court did not reach the question whether the principles of the *Switchmen's* case were applicable to the National Labor Relations Act.[22]

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not be presumed if it meant the obliteration of a right which Congress created (p. 29, *supra*). This statement does not have reference to the situation here, where the "denial" results from the administrative agency's allegedly erroneous interpretation of the statute; it refers only to the situation where there is no *tribunal*, administrative or otherwise, even to apply the statute. For, as the Court went on to indicate (*ibid.*), where Congress has set up an administrative tribunal for resolving representation questions, its actions alone may be regarded as adequate protection for the rights conferred by the statute.

[22] Similarly, no consideration was given to this question in *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145. That was a suit in the district court to enjoin the Board from declaring the union out of compliance with Section 9 (h) because of the falsity of the non-Communist affidavits filed by one of its officers; the union contended that the statute merely empowered the Board to determine whether the required affidavits had been filed, and that the Board thus exceeded its authority in determining whether the affidavits were truthful. Although in the district court the

We submit, therefore, that the doctrine of the *Switchmen's* case is controlling here and requires the conclusion that Congress deprived the district court of jurisdiction to review the Board's representation determination in this case.[23]

D. Since the Board's position on the statutory issue which it decided had a rational basis, judicial review is not required in this case on the theory that it may be necessary in order to correct wholly arbitrary agency action

As argued immediately above, we do not believe that the correctness of the Board's position on the merits is strictly relevant to the question of reviewability, even though the merits involve a statutory issue. We recognize, moreover, that in the Court of

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Board defended this suit on the ground, *inter alia*, that the court lacked jurisdiction to review the Board's action, this ground was not urged before this Court; only the question of the Board's power in respect to false affidavits was presented to this Court (see the Board's Brief in No. 57, October Term, 1956, p. 2). Moreover, it is apparent that the factors which, as we have shown, led Congress to preclude direct review of a Board representation determination were not applicable to the situation presented in the *Mine Mill* case, or in the analogous *Farmer* v. *United Electrical, Radio & Machine Workers*, 211 F. 2d 36 (C. A. D. C.), certiorari denied, 347 U. S. 943.

[23] Assuming the correctness of our position that Congress intended to preclude judicial review except as provided for in the Act, it follows that Section 10 of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1009) does not provide respondent with an independent basis for the instant suit. Section 10 is expressly made inapplicable to "(1) statutes [which] preclude judicial review or (2) agency action [which] is by law committed to agency discretion." *International Union, etc.* v. *International Union, etc.*, 173 F. 2d 557, 559 (C. A. 8); *White* v. *Herzog*, 80 F. Supp. 407, 411 (D. D. C.); *Kirkland* v. *Atlantic Coast Line R. Co.*, 167 F. 2d 529 (C. A. D. C.), certiorari denied, 335 U. S. 843. Cf. *Heikkila* v. *Barber*, 345 U. S. 229, 232–233, 235.

Appeals the Board did not contest the district court's interpretation of the statutory provision involved (Section 9 (b) (1)), but chose to stand on its jurisdictional objections. We undertake, at this point in our argument, to set forth our reasons for believing that the Board's interpretation of Section 9 (b) (1) has a rational basis, not because we think that the merits are before this Court, but because the Court might consider that in a situation characterized by complete arbitrariness there would be special reasons for implying the availability of a review procedure not otherwise open.

In relevant part, Section 9 (b) (1) provides:

> *Provided,* that the Board shall not (1) decide that any unit is appropriate for [purposes of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; * * *

Although a literal reading of this language may support the conclusion that the limitation was intended to apply *whenever* the Board intended to group professional employees in the same unit as nonprofessional employees, the legislative history of the proviso shows that it had a narrower purpose. Thus, Section 9 (f) (2) of the House Bill (H. R. 3020) required the Board to provide "a separate ballot for [*inter alia*] any * * * profession * * * within a proposed bargaining unit" and to "exclude from the bargaining unit any such group if less than a majority of the

employees in it who cast ballots shall have voted for the representative that the Board shall certify for such unit" (1 Legislative History of the Labor Management Relations Act, 1947, p. 62). The purpose of this provision, the House Report stated, was to prevent "distinguishable *minorities*" from being "forced * * * into bargaining units against their will" (1 Leg. Hist. 327; emphasis added). Respecting the similar Senate provision, which became the present Section (9) (b) (1), the Senate Report explains that its objective was to preclude "covering professional personnel into general units of production and maintenance employees or general units of office and clerical employees" because the professionals, since *"their number is always small in comparison with production or clerical employees,"* might not be adequately represented (1 Leg. Hist. 417; emphasis added). And, in adopting the Senate version, the House Conference Report stated (1 Leg. Hist. 540):

> The House bill did not contain any definition of the term "professional employee," but section 9 (f) (2) thereof gave professional personnel and other distinguishable groups of employees *an opportunity to exclude themselves from larger bargaining units* in which it was proposed that they be included. The Senate amendment accorded a similar treatment to professional employees and defined the term. * * * The conference agreement contains the same definition of "professional employee" as that contained in the Senate amendment, and accords to this category the same treatment which was pro-

vided for them in * * * the House bill. [Emphasis added.] [24]

In short, the legislative history of Section 9 (b) (1) indicates that the provision was merely intended to provide professional employees with a self-determination election when they constituted a minority in a proposed bargaining unit, and not when, as here, they constituted an overwhelming majority. For only in the former situation was there a real danger that, unless the professional employees were given an opportunity to vote separately, they might be swept, against their will, into a larger unit and submerged. On the other hand, to hold a separate election for professional employees where, as here, they constitute an overwhelming majority in the proposed unit, would not be necessary to insure that the views of the professional employees are fully reflected.[25] A separate election for professional employees in this situation would serve only to enable the professional employees to deprive other employees with a close community of employment interests—*e. g.*, the nine nonprofessionals in the unit here (see n. 2, p. 4, *supra*)—of the most suitable means of exercising their collective bargaining rights.

Accordingly, when the Board was first presented with the problem, shortly after Section 9 (b) (1) was

[24] See, also, 2 Leg. Hist., 1947, p. 1077; Hearings before the Senate Committee on Labor and Public Welfare on S. 55, *et al.*, 80th Cong., 1st sess., pp. 1702–1712.

[25] In this case, for example, it is clear that the votes of the nine nonprofessionals did not affect the results of the election (R. 21–22).

added to the Act, it concluded that the Section did not apply to the inclusion of a minor group of non-professional employees in a predominantly professional unit. *Continental Motors Corp.*, 77 N. L. R. B. 345, 347–348). This decision has been uniformly followed since that time.[26] Moreover, promptly after the *Continental Motors* decision, Congress was apprised of the Board's construction of Section 9 (b) (1) of the Act, by Chairman Paul M. Herzog. See Hearings before the Joint Committee on Labor-Management Relations, 80th Cong., 2d Sess., pp. 1147–1148. Congress was also apprised of this construction in 1949 and 1950.[27] Congress, however, has neither criticized the Board's interpretation of Section 9 (b) (1), nor undertaken to modify it. Cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365–366.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court should be

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[26] *Standard Oil Co.*, 107 N. L. R. B. 1524, 1525–1526; *Pacific Gas & Electric Co.*, 98 N. L. R. B. No. 130; *Miller Electric Co.*, 101 N. L. R. B. 1014, 1016; *Potomac Electric Power Company*, 99 N. L. R. B. 219; *Federal Telecommunications Laboratories, Inc.*, 92 N. L. R. B. 1395, 1396–1399; *Schwarz Laboratories, Inc.*, 89 N. L. R. B. 930, 931–932; *Westinghouse Electric Corp.*, 89 N. L. R. B. 8, 29, 34; *Boeing Airplane Co.*, 86 N. L. R. B. 368, 371; *E. R. Squibb & Sons*, 83 N. L. R. B. 792; *Westinghouse Electric Corp.*, 80 N. L. R. B. 591, 594–595.

[27] Thirteenth Annual Report of the National Labor Relations Board, p. 40, n. 19; Fourteenth Annual Report of the National Labor Relations Board, p. 38.

reversed, and that the case should be remanded to that court with instructions to dismiss the complaint for lack of jurisdiction over the subject matter.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
THOMAS J. McDERMOTT,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
NORTON J. COMB,
Attorney,
National Labor Relations Board.
MARCH 1958.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

SEC. 2. (12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; * * *

* * * * *

SEC. 9. * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional em-

ployees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

* * * * *

(c) (5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of

the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact

if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceedings, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * * *

Section 1337 of the Judicial Code (28 U. S. C.) provides as follows:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating com-

merce or protecting trade and commerce against restraints and monopolies.

Section 10 of the Administrative Procedure Act (5 U. S. C. 1009) provides in relevant part as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) *Right of review.*
>
> Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

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